Supreme Court, U.S.
FILED
AUG 0 4 2003
OFFICE OF THE CLERK

No. 02-1371

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

PATRICE SEIBERT,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF FOR PETITIONER

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

KAREN K. MITCHELL*
Chief Deputy Attorney General
JAMES R. LAYTON
State Solicitor
SHAUN J MACKELPRANG
KAREN P. HESS
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774

* Counsel of Record

58 pp

QUESTION PRESENTED

Is the rule "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings," *Oregon v. Elstad*, 470 U.S. 298, 318 (1985), abrogated when the initial decision to withhold the *Miranda* warnings was intentional?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

SUMMARY OF ARGUMENT 4

I. *MIRANDA* AND ITS PROGENY INTERPRET THE FIFTH AMENDMENT AS PROVIDING A NARROW EXCLUSIONARY RULE GOVERNING THE ADMISSIBILITY OF UNWARNED STATEMENTS MADE DURING CUSTODIAL INTERROGATION.. 8

A. The Fifth Amendment imposes a rule of admissibility that prohibits only the use of compelled statements at trial. 10

B. The *Miranda* exclusionary rule is narrow, only barring use of the unwarned statement in the prosecution's case in chief. 13

C. The holding in *Dickerson v. United States*, that *Miranda* is a "constitutional decision," does not undercut the narrow exclusionary rule articulated in *Miranda* and its progeny. 17

II. UNDER *OREGON V. ELSTAD*, THE ADMISSIBILITY OF WARNED STATEMENTS OBTAINED AFTER UNWARNED, CUSTODIAL INTERROGATION TURNS SOLELY UPON WHETHER THE WARNED STATEMENTS WERE "KNOWLINGLY AND VOLUNTARILY MADE.". 20

A. The "fruit of the poisonous tree" doctrine should not apply to subsequent, warned statements because there is no "poisonous tree" in the absence of an underlying constitutional violation, and the subsequent statement is the product of a separate act of volition and thus not the "fruit" of the previous interrogation. 21

B. The voluntary disclosure of a "guilty secret" during unwarned interrogation carries no constitutionally coercive "taint" because it is not the product of official coercion. 25

C. In deciding whether a subsequent, warned statement is admissible, a court focuses on the "totality of the circumstances" surrounding the warned statement and determines if it was knowingly and voluntarily made 26

III. INTENTIONALLY WITHHOLDING THE MIRANDA WARNINGS BEFORE QUESTIONING DOES NOT VIOLATE THE CONSTITUTION AND NEED NOT BE DETERRED ANY MORE THAN IT ALREADY IS BY THE EXCLUSION OF THE UNWARNED STATEMENT ITSELF FROM THE PROSECUTION'S CASE IN CHIEF. 28

A. Questioning before giving *Miranda* warnings does not warrant a presumption of compulsion as to the subsequent, fully-warned statement because it is not conduct that undermines the suspect's free will. 29

B. Focusing on the subjective intent of the officer ignores the relevant inquiry of the Fifth Amendment, improperly seeks to govern police conduct, and leads to disparate treatment of defendants 33

C. The deterrence rationale of the Fourth Amendment exclusionary rule should not be imported into the Fifth Amendment to create a broader *Miranda* exclusionary rule. 38

IV. RESPONDENT'S SUBSEQUENT, WARNED STATEMENT WAS VOLUNTARY AND WAS PROPERLY ADMITTED UNDER THE RATIONALE OF *OREGON V. ELSTAD*. 44

A. The officers did not engage in actually coercive conduct during the unwarned interrogation. 45

B. Respondent's second, warned statement was knowingly and voluntarily made. 47

CONCLUSION 49

TABLE OF AUTHORITIES

CASES **Page**

Ashcraft v. Tennessee, 322 U.S. 143 (1944) 45

Beckwith v. United States, 425 U.S. 341 (1976) . . . 34

Berkemer v. McCarty, 468 U.S. 420 (1984) 34

Carter v. Kentucky, 450 U.S. 288 (1981) 8

Chavez v. Martinez, 123 S.Ct. 1994, 2001 (2003) 5, 8, 12, 19, 22-23, 40

Colorado v. Connelly, 479 U.S. 157 (1986) 46

Colorado v. Spring, 479 U.S. 564 (1987) 45

Culombe v. Connecticut, 367 U.S. 568 (1961) 45

Connecticut v. Barrett, 479 U.S. 523 (1987) 18

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 27

Davis v. North Carolina, 384 U.S. 737 (1966) 27

Dickerson v. United States, 530 U.S. 428 (2000) 6, 17-19, 21, 27, 39

Griffin v. California, 380 U.S. 609 (1965) 8

Harris v. New York, 401 U.S. 222 (1971) 6, 13-14, 39-40

Jackson v. Denno, 378 U.S. 368 (1964) 45

Kastigar v. United States, 406 U.S. 441 (1972) 12

Lefkowitz v. Turley, 414 U.S. 70 (1973) 9

Malloy v. Hogan, 378 U.S. 1 (1964) 27

Michigan v. Tucker, 417 U.S. 433 (1974) 6, 14-15, 18-19, 39

Minnesota v. Murphy, 465 U.S. 420 (1984) 9

Miranda v. Arizona, 384 U.S. 436 (1966) . . . . *passim*

Moran v. Burbine, 475 U.S. 412 (1986) 12, 36-37, 43-44, 48

Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) 12

New York v. Quarles, 467 U.S. 649 (1984) 12, 15-16, 18, 35, 40

Oregon v. Elstad, 470 U.S. 298 (1985) . . . . . *passim*

Oregon v. Hass, 420 U.S. 714 (1975) 6, 14, 39

Rhode Island v. Innis, 446 U.S. 291 (1980) 34

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) . . 27

Scott v. United States, 436 U.S. 128 (1978) 35

Stansbury v. California, 511 U.S. 318 (1994) 34

State v. Rousan, 961 S.W.2d 831 (1998) 45

Stein v. New York, 346 U.S. 156 (1953) 45

United States v. Balsys, 524 U.S. 666 (1998) 9

United States v. Bayer, 331 U.S. 532 (1947) . . 25, 33

United States v. Carter, 884 F.2d 368 (8th Cir. 1989) 4, 30

United States v. Ceccolini, 435 U.S. 268 (1978) . . . 24

United States v. DeSumma, 272 F.3d 176 (3rd Cir. 2001) 16

United States v. Elie, 111 F.3d 1135 (4th Cir. 1997) 16

United States v. Esquilin, 208 F.3d 315 (1st Cir. 2000) 26, 30

United States v. Faulkingham, 295 F.3d 85 (1st Cir. 2002) 16

United States v. Gupta, 183 F.3d 615 (7th Cir. 1999) 17

United States v. Mendenhall, 446 U.S. 544 (1980) . 35

United States v. Orso, 266 F.3d 1030 (9th Cir. en banc 2001) 16, 30

United States v. Patane, 304 F.3d 1013 (10th Cir. 2002) 18

United States v. Robinson, 414 U.S. 218 (1973) . . . 35

United States v. Sterling, 283 F.3d 216 (4th Cir. 2002) 16

United States v. Verdugo-Urquidez, 494 U.S.259 (1990) 5, 9, 11

Watson v. Detella, 122 F.3d 450 (7th Cir. 1997) 17, 46

Whren v. United States, 517 U.S. 806 (1996) 35

Withrow v. Williams, 507 U.S. 680 (1993) 11, 17

Wong Sun v. United States, 371 U.S. 471 (1963) 21-22, 32, 47-48

CONSTITUTIONAL AND STATUTORY AUTHORITY

42 U.S.C. § 1983 22

Constitution of the United States, Amendment V ... 2

SCHOLARLY AUTHORITIES

Clymer, Steven D., *Are Police Free To Disregard Miranda?*, 112 YALE L.J. 447 (2002) 11

FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (4th ed. 2001) 41

No. 02-1371

In The Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

PATRICE SEIBERT,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Missouri Supreme Court (Petition Appendix A1-A26), is reported at 93 S.W.3d 700 (Mo. banc 2002).

JURISDICTION

The judgment of the Missouri Supreme Court was entered on December 10, 2002 (Pet. App. A1). The petition for certiorari was filed on March 10, 2003, and was granted on May 19, 2003. This Court has jurisdiction under 28 U.S.C. § 1257(a) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

STATEMENT

This case seeks to clarify whether the bright-line rule established in *Oregon v. Elstad*, 470 U.S. 298 (1985) – "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings" – is abrogated in cases where the initial decision to withhold the *Miranda* warnings was intentional.

This case arose out of the murder of Donald Rector, a young man who was staying in respondent's home in February 1997 (Tr. 855). Respondent's young son, Jonathan Seibert, who suffered from cerebral palsy and blindness, died in his bed of an unknown cause (J.A. 66; State's Exhibit 42; Tr. 757-758, 854, 836-837). When respondent discovered this, she was distraught (Tr. 836, 856, 858). Because of sores on his body, respondent feared being accused of abusing or neglecting her child (J.A. 67; State's Exhibit 42; Tr. 836-837, 858).[1]

Rather than report Jonathon's death, respondent arranged for another son, Darian, and Derrick Roper, a friend, to burn down her trailer home with Jonathan's body inside because, as she later told the police, "that'd been the easiest way to dispose of the body" (J.A. 67-68,

---

[1] An autopsy revealed that Jonathan was malnourished (Tr. 754).

70; State's Exhibit 42; Tr. 858-860, 903-904). To make it appear that Jonathan had not been left home alone and that his death was accidental, they concluded that Donald Rector would have to be in the home when it burned (J.A. 70, 72; State's Exhibit 42; Tr. 837-840, 858-861, 908). The plan was carried out on the evening of February 12, 1997; Rector died in the fire (J.A. 71; State's Exhibit 42; Tr. 757). Darian suffered serious burns and was hospitalized (J.A. 14-15, 25; Tr. 850).

The police obtained information from Derrick Roper implicating respondent (J.A. 46). At about 3:00 a.m., after talking to Roper, the police went to the hospital where respondent was staying with Darian, and they awakened and arrested her (J.A. 17, 26-27, 45-46, 51-52). The arresting officer transported respondent to the police department and placed her in a small interview room (J.A. 17-18, 45-46, 55). After about fifteen to twenty minutes alone, at about 3:45 a.m., respondent was questioned for about twenty to thirty minutes without being advised of the *Miranda* warnings (J.A. 18, 28, 30-31, 34, 55, 58). At this first interview, which was not recorded, the officer intentionally withheld the *Miranda* warnings, as he had been trained to do as part of a two-stage interrogation technique (J.A. 18, 27-34, 52, 59). Respondent made incriminating statements during the first interrogation (J.A. 35-37, 59-60).

Respondent was then given a fifteen- to twenty-minute break, in which she was given a cup of coffee and allowed to smoke a cigarette (J.A. 58-59). At 4:30 a.m., using a standard form, the officers gave the *Miranda* warnings (J.A. 19-20, 46, 48, 63-66; State's Exhibits 37, 42). Respondent indicated that she understood the warnings; she initialed each warning, signed the form, and said that she wanted to talk (J.A. 19-20, 46-48, 63-66; State's Exhibits 37, 42).

During the first, unwarned interview, when asked

if Donald Rector was supposed to die in the fire, respondent started to cry, and the questioning officer "[g]ently" squeezed her arm (J.A. 59). Throughout the interrogations, the officer sat fairly close to respondent and maintained eye contact, but at no time during either interrogation was respondent threatened in any way; nor were any promises made to her to induce her statements (J.A. 21-22, 47, 56-57; State's Exhibit 42). Respondent was questioned in low, conversational tones, and she was not subjected to any physical abuse (J.A. 21-22). At no time did respondent invoke her right to remain silent or request an attorney (J.A. 21).

The contents of the second, warned interview, were admitted into evidence at trial during the state's case in chief despite respondent's motion to suppress (J.A. 40, 42, 50-51).[2] On appeal, a four-member majority of the Supreme Court of Missouri, relying in part upon the Eighth Circuit's decision in *United States v. Carter*, 884 F.2d 368 (8th Cir. 1989), held that because the failure to give the *Miranda* warnings was intentional, the second confession should have been suppressed as the "product of the invalid first statement" (*i.e.*, the fruit of the poisonous tree) (Pet. App. A1). Three dissenting judges, citing *Oregon v. Elstad*, would have affirmed the ruling of the trial court, concluding that the officer's decision to withhold warnings did not render respondent's subsequent, fully-warned statement inadmissible (Pet. App. A15-A21).

SUMMARY OF ARGUMENT

Respondent's second, fully-warned confession may be excluded from evidence only if the Court: (1) holds that engaging in custodial interrogation without administering *Miranda* warnings is a constitutional violation that must be deterred by adopting a broad *Miranda* exclusionary rule that bars the admission of both unwarned and subsequent, fully-warned statements; or (2) holds that the psychologically coercive effect of a voluntary, unwarned statement, though not the product of official coercion, so "taints" the subsequent, warned statement as to render it involuntary. The Court previously rejected both of these alternatives in *Oregon v. Elstad*, 470 U.S. 298 (1985), and there is nothing about the intentional nature of the initial decision to withhold *Miranda* warnings that should alter the *Elstad* analysis. A broad reading of the *Miranda* exclusionary rule in this context is not necessary to fulfill the core purpose of the Fifth Amendment privilege.

[2] At trial, in cross-examining the officer, respondent elicited some of the content of her first, unwarned confession (J.A. 59).

The Fifth Amendment to the United States Constitution guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court crafted a rule that provided expanded protection of the Fifth Amendment right by attaching a "presumption of compulsion" to any unwarned statement and requiring its exclusion. 384 U.S. at 467-473; *Oregon v. Elstad*, 470 U.S. at 307. But the Fifth Amendment is a "trial right," *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); the unwarned statement, at least absent actual coercion, must be used at trial before there is an actual violation of the Fifth Amendment privilege. *See Chavez v. Martinez*, 123 S.Ct. 1994, 2001 (2003) (plurality opinion). The Fifth Amendment is, in essence, a rule of admissibility, and it is not primarily concerned with shaping police conduct.

Since *Miranda*, this Court has, on several occasions, addressed the breadth of the *Miranda* exclusionary rule. In each case the Court has declined to expand the deterrence rationale of the Fourth Amendment into the Fifth Amendment and found the *Miranda* exclusionary rule to

be narrow, excluding only the defendant's unwarned statement from the prosecution's case in chief. *See Harris v. New York*, 401 U.S. 222 (1971); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Oregon v. Hass*, 420 U.S. 714 (1975); *Oregon v. Elstad*. In one instance the Court even crafted an exception allowing the admission of unwarned statements to prove the state's case. *See New York v. Quarles*, 467 U.S. 649 (1984). This narrow interpretation of the *Miranda* exclusionary rule is appropriate because the decision to withhold the warnings, an act that is not itself a constitutional violation, results in only a presumption of compulsion. The Fifth Amendment protects against the use of "compelled" statements, and unwarned statements are not necessarily involuntary. *Oregon v. Elstad*, 470 U.S. at 310; *Miranda*, 384 U.S. at 456-458.

In *Dickerson v. United States*, 530 U.S. 428, 444 (2000), this Court characterized the *Miranda* safeguards as "constitutional" in character. But the fact that the warnings are constitutional does not render the decision to withhold them a constitutional violation, nor does it alter the analysis this Court employed in *Miranda* and its progeny.

One of those progeny is *Oregon v. Elstad*. Noting the fundamental difference between unreasonable searches and seizures and unwarned interrogation, the Court in *Elstad* refused to extend the Fourth Amendment's "fruit of the poisonous tree" doctrine to the Fifth Amendment context. *Elstad*, 470 U.S. at 306-309. This was appropriate, because the "fruits" analysis requires the existence of a constitutional violation (the "poisonous tree") that there is a compelling need to deter. But where there is only unwarned questioning, absent coercive conduct, there is no constitutional violation. Under such circumstances, there is no compelling reason to extend the deterrence rationale into the Fifth Amendment context. And even if *Elstad* is not read as

a categorical rejection of a broad *Miranda* exclusionary rule based on the "fruits" doctrine, it should be read to reject the application of the doctrine when the alleged "fruit" is a subsequent, fully-warned statement.

In *Elstad*, the Court also rejected the argument that a "subtle form of lingering compulsion" – an allegedly coercive "taint" – could result from the initial, unwarned, "cat out of the bag" statement. *Id.* at 310-312. The Court held that the subsequent administration of warnings "cure[d] the condition that rendered the unwarned statement inadmissible" and restored the suspect's free will. *Id.* at 310-311. Thus, when considering whether to admit a subsequent, warned statement, the focus is on the subsequent statement and whether it was knowingly and voluntarily made. *Id.* at 318. Only if the initial statement was actually involuntary can it "taint" and render the subsequent, warned statement involuntary.

The decision to withhold warnings is not a "deliberately coercive or improper tactic," *id.* at 314, that needs to be deterred any more than it already is by excluding the unwarned statement from the prosecution's case in chief. The subjective intent of the officer cannot have any effect on the suspect's decision to either make a statement or waive her Fifth Amendment privilege once warned. And the adoption of a subjective intent analysis would both stray from the core goal of the Fifth Amendment (to exclude compelled testimony) and lead to disparate results for defendants who, except for the subjective intent of the officer, make unwarned statements under exactly the same objective circumstances. This Court should decline to adopt rules, at least in the Fifth Amendment context, whose principal aim is to mold the conduct of police officers – especially when that conduct has a valid law-enforcement justification. *Miranda* and its progeny, particularly *Elstad*, already adequately deter improper police conduct (by inducing

officers to administer the warnings or, alternatively, treat suspects fairly to ensure that subsequent, warned statements are admissible), and the exclusion of the unwarned statement from the prosecution's case is a sufficient remedy.

ARGUMENT

I. *MIRANDA* AND ITS PROGENY INTERPRET THE FIFTH AMENDMENT AS PROVIDING A NARROW EXCLUSIONARY RULE GOVERNING THE ADMISSIBILITY OF UNWARNED STATEMENTS MADE DURING CUSTODIAL INTERROGATION.

The Self-Incrimination Clause of the Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." This privilege against self-incrimination was born out of a desire to protect the people of this nation against the invidious practice of coercing individuals to testify against themselves. *See Miranda v. Arizona*, 384 U.S. 436, 458-460 (1966). The privilege is a precious right, "fixed in our Constitution only after centuries of persecution and struggle." *Id.* at 442.

As the text of the amendment reveals, the core protection of the Fifth Amendment is that criminal defendants cannot be compelled to testify against themselves at a criminal trial. *See Chavez v. Martinez*, 123 S.Ct. 1994, 2000-2001 (2003) (plurality opinion). To fully effectuate that guarantee, this Court has crafted rules that uphold that core protection, and, at times, this Court has crafted rules that provide expanded protection of the right. *See Carter v. Kentucky*, 450 U.S. 288, 300 (1981) (a judge must instruct the jury not to draw an adverse inference from a defendant's failure to testify); *Griffin v. California*, 380 U.S. 609, 614 (1965) (no penalty may be imposed on a defendant for refusing to testify at a criminal trial).

Under some circumstances, the privilege can be invoked outside a criminal trial. It has long been recognized that the privilege "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)). But the Fifth Amendment is a "trial right." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). Thus, while the right may be invoked outside of the criminal trial, to invoke the privilege, the individual must "demonstrate that any testimony he might give . . . could be used in a criminal proceeding against him[.]" *United States v. Balsys*, 524 U.S. 666, 671-672 (1998).

Because interrogation is often intended to obtain statements that can be "used in a [later] criminal proceeding," the Court has crafted rules governing the admissibility of such statements to guard against later violations of the Fifth Amendment at trial. In *Miranda v. Arizona*, the Court set forth "safeguards" – the "*Miranda*" warnings – that must be utilized to protect the core guarantee of the Fifth Amendment. *Miranda v. Arizona*, 384 U.S. at 467-473. The Court acknowledged that *Miranda* (and its companion cases) did not necessarily involve "involuntary" confessions; nevertheless, the Court concluded that the risk of introducing a compelled statement was unacceptably high and necessitated the use of explicit warnings to ensure that a decision to speak was "the product of free choice." *Id.* at 457.

In other words, in the absence of warnings and a valid waiver, the Court concluded that any statement obtained during custodial interrogation would carry a "presumption of compulsion" and would not be admissible in the prosecution's case in chief. *See*

Oregon v. Elstad, 470 U.S. 298, 307 (1985) ("Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*."). As the Court stated in *Miranda*:

> After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

384 U.S. at 479. Again, the *Miranda* exclusionary rule operates regardless of a statement's otherwise voluntary nature. *See Oregon v. Elstad*, 470 U.S. at 306-307.

Thus, while the Fifth Amendment privilege must be jealously guarded – even by the implementation of rules allowing individuals to invoke it long before trial – its basic guarantee is inextricably tied to prohibiting the *use* of compelled testimony at trial. In short, only when a person's statements are compelled in a constitutionally impermissible fashion should those statements be excluded from the prosecution's case. Otherwise, a person has not been "compelled" to be a "witness" against himself "in any criminal case."

A. The Fifth Amendment imposes a rule of admissibility that prohibits only the use of compelled statements at trial.

In discussing the Fifth Amendment, this Court has made clear that it is the *use* of compelled statements, not their acquisition, that the privilege prohibits: "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants." *United States v. Verdugo-Urquidez*, 494

U.S. at 264. When later quoting *Verdugo-Urquidez*, this Court emphasized, with italics, that the Fifth Amendment privilege is "a fundamental *trial* right." *Withrow v. Williams*, 507 U.S. 680, 691 (1993) (internal quotation marks omitted). Thus, "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *United States v. Verdugo-Urquidez*, 494 U.S. at 264. The text of the Fifth Amendment demonstrates that compulsion alone does not violate the Fifth Amendment privilege against self-incrimination. In essence, the Fifth Amendment is a constitutionally created exclusionary rule limiting the use of compelled statements. *See* Steven D. Clymer, *Are Police Free To Disregard Miranda?*, 112 YALE L.J. 447, 476 (2002).

In *Miranda*, the Court effectively expanded the protection of the Fifth Amendment privilege by attaching a presumption of coercion to unwarned statements that merely jeopardized the core guarantee against compelled self-incrimination. But this Court did not alter the fundamental nature of the Fifth Amendment privilege. *Miranda* merely created a limited rule of exclusion that protects the core guarantee of the Fifth Amendment: that no compelled testimony will be used against the accused at trial. Indeed, at the outset, the Court acknowledged that its opinion addressed the "*admissibility* of statements obtained from an individual who is subjected to custodial police interrogation[.]" 384 U.S. at 439 (emphasis added). Thus, the rules announced by *Miranda* and its progeny operate to prohibit the use of presumptively compelled statements, but they cannot be expanded to achieve purposes that are beyond the scope of the Fifth Amendment privilege.

In that vein, the *Miranda* exclusionary rule was not designed to delineate the pattern of every criminal investigation; it was not designed to impose a code of conduct on officers; and, in fact, the Court lacks the

authority to impose such a code. *See Moran v. Burbine*, 475 U.S. 412, 425 (1986) ("Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege."). Instead, with regard to law enforcement, the *Miranda* exclusionary rule performs the valuable function of informing officers of the parameters they must work within to obtain *admissible* evidence.

Thus, although it is generally necessary for police to give the *Miranda* warnings to obtain statements admissible at trial, a decision to withhold the warnings does not by itself violate the Fifth Amendment. *Chavez v. Martinez*, 123 S.Ct. at 2001 (plurality opinion). The exclusionary rule constructed and refined by *Miranda* and its progeny, like the privilege from which it springs, is a rule of admissibility.[3] Consequently, while safeguards can be erected prior to trial to secure the "trial right" against self-incrimination, nothing in the Fifth Amendment supports the creation of any independent right or protection against particular kinds of police conduct or otherwise supports regulation of police conduct as a constitutional end in itself. The constitutional right can only be violated at trial.

In sum, the *Miranda* exclusionary rule was designed to secure the Fifth Amendment privilege against self-

[3] That the Fifth Amendment privilege prohibits use is evident in the application of the immunity doctrine, which permits the government to compel answers to questions by use of an express threat of contempt, despite an assertion of the Fifth Amendment privilege, if the government guarantees that the statement and anything derived from it will not be used in the criminal prosecution. *Kastigar v. United States*, 406 U.S. 441 (1972). A broader exclusionary rule is, perhaps, warranted in the immunity cases because in such cases, the individual is subjected to "'the cruel trilemma of self-accusation, perjury, or contempt.'" *See New York v. Quarles*, 467 U.S. 649, 669-670 (1984) (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964)) (O'Connor, J., concurring in part and dissenting in part).

incrimination. It was not designed to deter a specific type of official misconduct, *i.e.*, it was not designed to prohibit unwarned interrogation altogether; rather, it was designed to safeguard the core guarantee of the Fifth Amendment against the admission of potentially compelled statements at trial. Indeed, while recognizing the "potentiality for compulsion," the Court acknowledged that the cases before it probably did not run afoul of the voluntariness test developed in its earlier cases. *Miranda v. Arizona*, 384 U.S. at 457 ("In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. . . . To be sure, the records do not evince overt physical coercion or patent psychological ploys."). In short, *Miranda* did not create a rule that police officers may not engage in unwarned, custodial interrogation. Rather, consistent with the Fifth Amendment guarantee, it created a rule that excludes unwarned statements from the prosecution's case in chief because unwarned statements are burdened with a presumption of compulsion.

B. The *Miranda* exclusionary rule is narrow, only barring use of the unwarned statement in the prosecution's case in chief.

Although the *Miranda* exclusionary rule limits the admissibility of unwarned statements, a series of post-*Miranda* decisions demonstrates that the rule is quite narrow in its application. It ordinarily bars the use of unwarned statements in the prosecution's case in chief. But it does not bar all use of evidence obtained without the administration of the required warnings. Indeed, the Court recognized in *Harris v. New York*, 401 U.S. 222 (1971), that "[i]t does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224.

In *Harris*, the Court acknowledged limits on the *Miranda* exclusionary rule. There, a police officer gave the suspect incomplete warnings. *Id.* at 224. The Court held that although *Miranda* prohibited the prosecution from making its case with an improperly warned statement, evidence obtained in the absence of complete warnings could be used to impeach the defendant's credibility. *Id.* at 224-226. Similarly, in *Oregon v. Hass*, 420 U.S. 714 (1975), where a defendant's statement was ruled inadmissible in the prosecution's case because it came after his request for an attorney, the Court ruled that the statement was nevertheless admissible to impeach his testimony because it was not actually "involuntary or coerced." *Id.* at 715-716, 722-723.

A few years after *Harris*, the Court addressed another limitation question: whether *Miranda's* rule excludes not just the unwarned statement, but also evidence derived from it. The issue in *Michigan v. Tucker*, 417 U.S. 433 (1974), was whether the testimony of a third party should be excluded when the third party's identity was discovered only because of a statement made during an interrogation in which the defendant had received defective *Miranda* warnings. 417 U.S. at 435-437. In finding the evidence admissible, the Court held that the prohibition against using unwarned statements "to prove the prosecution's case at trial," did not extend to derivative evidence under the facts of that case. *Id.* at 445, 450-452. *Miranda's* requirements were "fully complied with . . . [because] respondent's statements . . . were not admitted against him at trial." *Id.* at 445. And, in rejecting the exclusion of the evidence based on the "fruit of the poisonous tree" doctrine, the Court drew a distinction between an "actual[] infringe[ment]" of the Fourth Amendment and a "depart[ure]" from the *Miranda* safeguards which are intended to safeguard the Fifth Amendment privilege.

Id. at 445-446.[4]

About a decade later, relying in part on the analysis of *Tucker*, this Court again refused to exclude evidence other than the unwarned statement as "fruit of the poisonous tree." The question before the Court was whether an initial failure to advise a defendant of the *Miranda* warnings rendered a subsequent, fully-warned statement inadmissible. *See Oregon v. Elstad*, 470 U.S. 298, discussed in part II, *infra*.

Meanwhile, in another case, citing the demands of "public safety," the Court refused to exclude both a statement and physical evidence derived from the statement, even though both were obtained prior to administering *Miranda* warnings. In *New York v. Quarles*, 467 U.S. 649, a woman told police officers that she had been raped, described the assailant, and told them that he was in a nearby grocery store, carrying a gun. 467 U.S. at 651-652. One of the officers chased the defendant through the store and, when he apprehended him, the defendant was wearing an empty holster. *Id.* at 652. The officer asked where the gun was and the defendant revealed its location. *Id.* The officer retrieved the gun, formally arrested the defendant, and read him the *Miranda* warnings. *Id.* This Court crafted an exigency-based "'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence," reasoning that officers may otherwise hesitate to ask questions necessary to protect public safety out of a concern that any evidence uncovered will be inadmissible. *Id.* at 655-658.

---

[4] While the facts in *Tucker* did not warrant the application of the exclusionary rule for its deterrence value, the Court left open the possibility that different facts could warrant an extension of the rule to the Fifth Amendment context. *Michigan v. Tucker*, 417 U.S. at 446-447. *But see* pp. 38-44, *infra*.

In a separate opinion which foreshadowed *Oregon v. Elstad*, Justice O'Connor, addressing the admissibility of the gun, advocated a bright-line rule that physical evidence obtained as a result of a confession after unwarned questioning be admissible. *Id.* at 660 (concurring in part and dissenting in part). She contrasted the mere failure to warn with "abusive police practices." *Id.* at 671-672. The latter implicates due process concerns and justifies a broader exclusionary rule; however, "where the accused proves only that the police failed to administer the *Miranda* warnings, exclusion of the statement itself is all that will and should be required." *Id.* at 672. "Limitation of the *Miranda* prohibition to testimonial use of the statements themselves adequately serves the purposes of the privilege against self-incrimination." *Id.*

Consistent with *Tucker*, *Quarles*, and *Elstad*, most circuit courts of appeals that have confronted the issue have read *Miranda's* progeny to generally permit the admission of the alleged "fruits" of statements obtained without full *Miranda* warnings. *See United States v. Faulkingham*, 295 F.3d 85 (1st Cir. 2002) (derivative evidence not excluded when the failure to give *Miranda* warnings was negligent); *United States v. DeSumma*, 272 F.3d 176 (3rd Cir. 2001), *cert. denied*, 535 U.S. 1028 (2002) (the "fruits" doctrine would not operate to exclude derivative physical evidence when a defendant gives an otherwise voluntary statement without *Miranda* warnings); *United States v. Sterling*, 283 F.3d 216 (4th Cir. 2002), *cert. denied*, 536 U.S. 931 (2002) (the "fruits" doctrine would not operate to exclude derivative physical evidence); *United States v. Elie*, 111 F.3d 1135, 1141-1142 (4th Cir. 1997) (fruits of violations of *Miranda* are admissible); *United States v. Orso*, 266 F.3d 1030, 1034-1035, 1039 (9th Cir. 2001) (en banc), *cert. denied*, 123 S.Ct. 125 (2002) (the lack of *Miranda* warnings alone does not require suppression of a subsequent warned statement); *see also United States v. Gupta*, 183 F.3d

615, 618-619 (7th Cir. 1999) (a second, fully warned statement was admissible under *Elstad* because it was voluntary); *Watson v. Detella*, 122 F.3d 450 (7th Cir. 1997) (same).

Read together, *Miranda* and its progeny refuse to apply a broad, Fourth Amendment-style exclusionary rule, instead interpreting the Fifth Amendment privilege as simply the right not to have a presumptively compelled statement used against the defendant at trial to prove the state's case. The constitutional safeguards set out in *Miranda* protect "a fundamental *trial* right." *Withrow v. Williams*, 507 U.S. at 691 (internal quotation marks omitted). And it is this core guarantee of the Fifth Amendment – that there will be no compelled self-incrimination at trial – which must be at the center of any attempt to craft constitutional, evidentiary rules.

C. The holding in *Dickerson v. United States*, that *Miranda* is a "constitutional decision," does not undercut the narrow exclusionary rule articulated in *Miranda* and its progeny.

The narrow reading of the *Miranda* exclusionary rule was implicitly confirmed by the Court in *Dickerson v. United States*, 530 U.S. 428, 432 (2000): "*Miranda* and *its progeny* in this Court *govern* the *admissibility* of statements made during custodial interrogation . . ." (Emphasis added.) In concluding that Congress could not overrule *Miranda*, the Court discussed the constitutional underpinnings of the *Miranda* decision and concluded that in *Miranda* the Court announced what was, and had been treated as, a "constitutional rule." *Id.* at 440-444. But characterizing the *Miranda* decision as "constitutional" does not change the character of the Fifth Amendment privilege. And it does not require a broadening of *Miranda*'s exclusionary rule.

Indeed, in *Dickerson*, the Court stated that it "need

not go further than *Miranda* to decide this case." *Id.* at 442. And, as stated above, it affirmed the continuing validity of *Miranda* and its progeny. The decision in *Dickerson* thus preserved the various limitations and exceptions to the general rule of *Miranda*. Any suggestion that *Dickerson* somehow altered the breadth of the *Miranda* exclusionary rule, therefore, goes beyond the express language of the Court's opinion.

Admittedly, *Dickerson* did provide fodder for those claiming a broader *Miranda* exclusionary rule. They allege that *Dickerson* damaged the underpinnings of post-*Miranda* decisions that seemed to indicate that the *Miranda* warnings were not required by the Constitution. Before *Dickerson*, the Court had referred to the *Miranda* warnings as "prophylactic" in nature. *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (stating that "the *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights"); *New York v. Quarles*, 467 U.S. at 653 (referring to the *Miranda* warnings as "prophylactic"); *Michigan v. Tucker*, 417 U.S. at 444 (stating that the *Miranda* warnings are "not themselves rights protected by the Constitution").[5] But "constitutional" and "prophylactic" are not mutually exclusive terms.

A constitutional rule can be "prophylactic" or preventative in nature. Before *Miranda*, the principal issue in cases addressing the admissibility of allegedly coerced statements was whether the defendant's state-

[5] Due to a perceived difference between "constitutional" and "prophylactic" rules (and there may be instances when a prophylactic rule is *not* a constitutional one), the Tenth Circuit has concluded that, while *Elstad* survived *Dickerson* in a "fundamentally altered" landscape, derivative physical evidence must be excluded if it is obtained after a *Miranda* violation. *United States v. Patane*, 304 F.3d 1013, 1024, 1029 (10th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3530 (U.S. April 21, 2003) (No. 02-1183).

ment was voluntary. *Michigan v. Tucker*, 417 U.S. at 441. *Miranda* shifted the focus to the issue of whether the defendant validly waived his Fifth Amendment right against self-incrimination. *See id.* at 442-443. For a waiver to be valid, it must be "voluntarily, knowingly and intelligently" made. *Id.* at 444 (quoting *Miranda v. Arizona*, 384 U.S. at 444). Adequate warnings help to satisfy these requirements and prevent violations of the Fifth Amendment. Thus, the constitutional safeguards set out in *Miranda* are prophylactic because they assure a valid waiver, and prevent a subsequent violation, of the underlying constitutional right. The warnings are a constitutional rule that safeguard a constitutional right, but they themselves are not constitutional rights. *Chavez v. Martinez*, 123 S.Ct. at 2003-2004 (plurality opinion) (rejecting a claim for damages under 42 U.S.C. § 1983 because compulsive questioning without more does not violate the Self-Incrimination clause); *Michigan v. Tucker*, 417 U.S. at 444 (the *Miranda* warnings are "not themselves rights protected by the Constitution").

Accordingly, even in the wake of *Dickerson*, there is no reason to expand the reach of *Miranda*'s exclusionary rule. The Fifth Amendment privilege is served by *Miranda* and its progeny – *see Oregon v. Elstad*, 470 U.S. at 306 ("The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment") – and the Fifth Amendment makes no demand other than the exclusion of compelled testimony from the prosecution's case in chief. Thus, to the extent that the application of *Miranda*'s rule sometimes exceeds the demands of the Fifth Amendment (which excess simply provides a heightened level of constitutional protection), it is entirely proper to limit the application of such a rule under certain circumstances – as this Court did in *Oregon v. Elstad*.

II. UNDER *OREGON V. ELSTAD*, THE ADMISSIBILITY OF WARNED STATEMENTS OBTAINED AFTER UNWARNED, CUSTODIAL INTERROGATION TURNS SOLELY UPON WHETHER THE WARNED STATEMENTS WERE "KNOWINGLY AND VOLUNTARILY MADE."

In *Elstad*, as in this case, the Court faced a situation in which there had been two interrogations – one before and one after the administration of the *Miranda* warnings. Only the post-warning statement was admitted at trial. The Court concluded that the Fourth Amendment "fruits" doctrine did not apply in the Fifth Amendment context, where there was no underlying constitutional violation, and thus rejected the defendant's efforts to have a post-warning statement excluded as the "fruit of the poisonous tree." *Elstad*, 470 U.S. at 305-309. "[T]he *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted." *Id.* at 307. The Court explained that when the alleged "fruit" of the poisonous tree is merely the accused's subsequent "voluntary testimony," there is no justification for a "broader [exclusionary] rule." *Id.* at 308.

The Court did not ignore the question raised by the initial absence of *Miranda* warnings. Having rejected the "poisonous tree" approach, the Court considered whether the initial, unwarned statement so tainted the subsequent, fully warned statement as to render it involuntary. *Id.* at 308-314. The Court held, however, that "[o]nce warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." *Id.* at 308. Thus, "[n]o further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver." *Id.* at 318. To return again to the words of *Miranda*, the holding in *Elstad* was that the

mere existence of a previous unwarned statement does not prevent a defendant's subsequent, warned statement from "truly be[ing] the product of his free choice." *Miranda v. Arizona*, 384 U.S. at 458. That is – and should remain – the rule.

A. The "fruit of the poisonous tree" doctrine should not apply to subsequent, warned statements because there is no "poisonous tree" in the absence of an underlying constitutional violation, and the subsequent statement is the product of a separate act of volition and thus not the "fruit" of the previous interrogation.

The "fruit of the poisonous tree" doctrine arose in Fourth Amendment jurisprudence to afford a remedy for a completed constitutional violation. *See Oregon v. Elstad*, 470 U.S. at 305-306 (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)). In refusing to apply the "fruits" doctrine to the asserted *Miranda* violations in both *Michigan v. Tucker* and *Oregon v. Elstad*, the Court repeatedly acknowledged the difference between actual Fourth Amendment violations and unwarned interrogation under the Fifth Amendment

In *Dickerson v. United States*, this Court commented upon the holding in *Elstad* and stated:

> Our decision in that case – refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases – does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.

Id. at 441. This observation assumed the constitutional nature of the *Miranda* rules, but it implicitly reaffirmed earlier descriptions of the *Miranda* rule as a safeguard intended to assure the valid waiver of the Fifth

Amendment privilege. Thus, while the *Miranda* rule is a constitutional rule, the failure to adhere to the safeguard alone is not a constitutional violation that supports the application of the broader "fruits" exclusionary rule in the Fifth Amendment context. *See Oregon v. Elstad*, 470 U.S. at 308 ("Since there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed.").

That mere questioning in the absence of *Miranda* warnings does not constitute a completed constitutional violation was largely reaffirmed in *Chavez v. Martinez*, 123 S.Ct. 1994 (2003). Chavez subjected Martinez to unwarned questioning; however, Martinez was not charged with any crime, and his statements were never used against him in any criminal proceeding. 123 S.Ct. at 1999-2000 (plurality opinion). In seeking damages under 42 U.S.C. § 1983, he nevertheless claimed that a law enforcement officer had violated his Fifth Amendment rights. *Id.* at 2000. In an opinion delivered by Justice Thomas, a plurality of the Court stated that "[t]he text of the Self-Incrimination Clause simply cannot support the . . . view that the mere use of compulsive questioning, without more, violates the Constitution." *Id.* at 2001. In other words, because the defendant's statements were never used at trial, there was no Fifth Amendment violation to remedy.

Similarly, in a separate opinion delivered by Justice Souter, two justices rejected the claim that "questioning alone was a completed violation" of the Fifth Amendment. *Id.* at 2006-2007 (Souter, J., opinion concurring in judgment). Expanded protection of the Fifth Amendment privilege could be warranted if "the core guarantee [of the Fifth Amendment], or the judicial capacity to protect it, would be placed at some risk in the absence of such complementary protection." *Id.*

But, seeing no such danger in that case, and foreseeing endless civil claims arising out of alleged violations of *Miranda*, the opinion concluded that the petitioner had failed to "make the 'powerful showing,' subject to a realistic assessment of costs and risks, necessary to expand protection of the privilege against compelled self-incrimination to the point of civil liability he asks us to recognize here." *Id.* at 2007.

Concurring in part and dissenting in part, two justices agreed "that failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues." *Id.* at 2013 (Kennedy, J., concurring in part and dissenting in part). They opined, however, that "[a] constitutional right is traduced the moment torture or its close equivalents are brought to bear," *i.e.*, that a violation can occur in the police station if there is actual coercion and not only when a compelled statement is introduced at trial. *Id.* Likewise, Justice Ginsburg opined that "the Self-Incrimination Clause applies at the time and place police use severe compulsion to extract a statement from a suspect." *Id.* at 2018 (Ginsburg, J., concurring in part and dissenting in part).

The varying approaches set out in *Chavez* all relate to the analysis in *Elstad* and they find a workable – if not wholly unified – synthesis there. In *Elstad*, there was brief, unwarned interrogation of the defendant. 470 U.S. at 301. Because the initial, unwarned interrogation violated *Miranda*'s rules, any statement obtained thereby had to be excluded from the prosecution's case in chief. *Id.* at 317. But, absent actually coercive police conduct (during either the initial and subsequent interrogation), the subsequent, warned confession was admissible if knowingly and voluntarily made (despite the earlier lack of *Miranda* warnings). *Id.* at 317-318.

In other words, failing to administer the *Miranda*

warnings is not, in and of itself, a constitutional violation capable of "tainting" the subsequent confession and rendering it inadmissible. But police misconduct involving actual coercion could be. *Elstad*, therefore, should be read as a broad rejection of the "fruits" doctrine in the *Miranda* context, because when there is no underlying violation of a constitutional right, there is no "poisonous tree." *See id.* at 308 (equating the situation where the alleged "fruit" is the accused's own subsequent, voluntary testimony with situations where the fruit is a witness or an article of evidence).

But even if *Elstad* is not read to reject the "fruits" doctrine in the Fifth Amendment context, or if *Dickerson* is read to alter this aspect of *Elstad*, the reasoning of *Elstad* demonstrates that a broad exclusionary rule should not apply to bar the admission of a subsequent, fully-warned statement when the initial unwarned statement was otherwise voluntary. A fully-warned confession in the wake of unwarned interrogation is the product of *volition*, willingly offered up by a defendant who is aware of the *Miranda* warnings. "[A] careful and thorough administration of *Miranda* warnings serves to *cure* the condition that rendered the unwarned statement inadmissible." *Elstad*, 470 U.S. at 310-311 (emphasis added). "Once warned, the suspect is free to exercise [her] own volition in deciding whether or not to make a statement to the authorities." *Id.* at 308. This approach is consistent with the Fourth Amendment doctrine, which treats volitional witness testimony as less susceptible to suppression as "fruits of the poisonous tree." *See United States v. Ceccolini*, 435 U.S. 268, 279-280 (1978). In other words, the subsequent administration of *Miranda* warnings is an intervening event that separates the second statement from the first, making it no longer the product or "fruit" of the unwarned interrogation.

B. The voluntary disclosure of a "guilty secret" during unwarned interrogation carries no constitutionally coercive "taint" because it is not the product of official coercion.

The obviously coercive effect of threats or physical abuse is quite unlike the effect of a previous, unwarned admission. An unwarned admission has, at most, a lingering psychological impact. But in *Elstad*, the Court held that any "lingering compulsion" resulting from the initial unwarned statement lacked constitutional implications. *Oregon v. Elstad*, 470 U.S. at 311-312.

The Oregon Supreme Court had reached a contrary conclusion. That court said that by answering the first question, the defendant must have believed that "he ha[d] let the cat out of the bag and, in so doing, ha[d] sealed his own fate." *Id.* at 310-311. But this Court rejected the proposition that the prior answer had an improperly coercive effect, explaining that the "voluntary disclosure of a guilty secret" does not qualify "as state compulsion," and it does not "compromise[] the voluntariness of a subsequent, informed waiver." *Id.* at 311-312. "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Id.* at 314.

This is not to say that the existence of the previous, unwarned statement can have no effect upon the suspect during subsequent questioning. For, once a statement is made to law enforcement officers, the suspect is "never thereafter free of the psychological and practical disadvantages of having confessed." *Id.* at 311 (quoting *United States v. Bayer*, 331 U.S. 532, 540-541 (1947)). Nevertheless, absent official compulsion, the existence of a prior statement should have no bearing upon the admissibility of a subsequent, fully-warned statement obtained after a valid waiver. Indeed, even if

officers refer to the unwarned admission during subsequent questioning, such references should not generally affect the admissibility of the subsequent statement. Of course, the unwarned admission cannot be exploited to pressure a suspect to waive her Fifth Amendment right to remain silent, *see id.* at 316 (officers did not "exploit the unwarned admission to pressure [the suspect] into waiving"); however, it would exalt form over substance to forbid officers from mentioning a fact that is already out in the open.

C. In deciding whether a subsequent, warned statement is admissible, a court focuses on the "totality of the circumstances" surrounding the warned statement and determines if it was knowingly and voluntarily made.

The admissibility of a warned statement that follows an unwarned statement, as with any other statement, turns "solely on whether it is knowingly and voluntarily made." *Elstad*, 470 U.S. at 309. Therefore, rather than applying a "fruits" analysis – where once a constitutional violation is found the presumption of exclusion carries forward and can only be overcome by proving the "taint" was dissipated – under *Elstad*, the prosecution must only prove that the statement was knowingly and voluntarily made, and the court must evaluate the statement under the totality of the circumstances.

The proper administration of the *Miranda* warnings adequately addresses the "knowingly" requirement. *See id.* at 316 (rejecting the need for an additional or modified warning in cases where there has been an unwarned statement). Consequently, after there has been a valid warning and waiver, the focus must turn to the voluntariness of the statement. *Id.* at 309; *see United States v. Esquilin*, 208 F.3d 315, 320 (1st Cir. 2000) (describing *Elstad*'s focus on the issue of voluntariness). To determine whether the warned statement was voluntary, courts look at the warned interrogation to see if it was coercive, and also look at all of the events surrounding the unwarned statement to determine if there were other circumstances that tended to undermine the "suspect's will to invoke his rights." *Oregon v. Elstad*, 470 U.S. at 309-311, 317.

This Court has never abandoned the due process jurisprudence that initially served as the basis for excluding involuntary statements. *Dickerson v. United States*, 530 U.S. at 434. After this Court's decisions in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Miranda*, the focus shifted to determining admissibility under the Fifth Amendment. *Dickerson*, 530 U.S. at 434. But the Court still employs the due process "totality of all the surrounding circumstances" voluntariness analysis. *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). The appropriate standard under due process is whether the circumstances as a whole tend to "shock[] the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

The initial decision to withhold warnings can be considered in combination with all other attendant circumstances to determine whether there was a due process violation. While not giving *Miranda* warnings is "a significant factor," standing alone it does not violate due process. *Davis v. North Carolina*, 384 U.S. 737, 740-741 (1966) (failure of police to provide *Miranda* warnings "gives added weight to the other circum-stances" considered to determine if the confession was voluntary). Generally, to exclude a confession, the totality of the circumstances must demonstrate that the defendant's will was overborne. *Dickerson v. United States*, 530 U.S. at 433-434.

In sum, even if this Court were inclined to revisit its precedent and adopt a broader *Miranda* exclusionary rule that bars the admission of not only the unwarned

statement but also derivative evidence, such a rule would not bar admission of a subsequent, warned statement. A subsequent, warned statement is not derivative of the initial unwarned statement; rather, it is the product of a separate volitional act. The general rule of *Elstad* – "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings" – should not be overruled, and the admission of warned statements should continue to turn solely upon whether such statements are knowing and voluntary under the totality of the circumstances.

III. INTENTIONALLY WITHHOLDING THE *MIRANDA* WARNINGS BEFORE QUESTIONING DOES NOT VIOLATE THE CONSTITUTION AND NEED NOT BE DETERRED ANY MORE THAN IT ALREADY IS BY THE EXCLUSION OF THE UNWARNED STATEMENT ITSELF FROM THE PROSECUTION'S CASE IN CHIEF.

The Missouri Supreme Court distinguished this case from *Elstad* by pointing out that the questioning officer here "purposely withheld" the *Miranda* warnings before the first stage of the interrogation. (Pet. App. A7). And it was to this "intentional" withholding of the *Miranda* warnings – as opposed to the allegedly "inadvertent" withholding in *Elstad* – that the Missouri Court attached a presumption of coercion that carried forward even after adequate warnings were given. (Pet. App. A9-A13). In so doing, the Missouri Court did not find that the initial statement was involuntary; rather, it focused on the intentional nature of the decision not to warn.

A. Questioning before giving *Miranda* warnings does not warrant a presumption of compulsion as to the subsequent, fully-warned statement because it is not conduct that undermines the suspect's free will.

In *Elstad*, the Court analyzed the coercive effect of an unwarned statement by determining whether that statement was, aside from the *Miranda*-based presumption of compulsion, voluntary. *Oregon v. Elstad*, 470 U.S. at 318. This was logical because absent a determination that the first, unwarned statement was actually involuntary, there was no basis to find that it could have affected the voluntariness of a statement made after adequate warnings. Yet, in respondent's case, the Missouri Court never found that respondent's initial statement was actually involuntary. Instead, the court concluded that an initial, unwarned statement, whether voluntary or involuntary, can render a subsequent statement involuntary based on the officer's subjective intent in withholding the *Miranda* warnings (Pet. App. A7-A9).

In an attempt to reconcile its holding with *Elstad*, the Missouri Court appears to have found that the decision not to provide the initial *Miranda* warning was an improper tactic as that phrase is used in a passage from *Elstad*: "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion" as to the subsequent statement. 470 U.S. at 314. But the Missouri Court misunderstood the meaning of "improper tactics." Although the Court in *Elstad* did not define the phrase, its meaning is reflected in the emphasis on voluntariness throughout the *Elstad* opinion. As the First Circuit noted in *United States v. Esquilin*, 208 F.3d at 320, in *Elstad* the Court used several additional detailed phrases that are synonymous with the term "improper tactics" and reflect the Court's focus on

official misconduct during the initial unwarned statement that tends to undermine the suspect's free will. These phrases included: "actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," 470 U.S. at 309; "physical violence or other deliberate means calculated to break the suspect's will," *id.* at 312; and "inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary and undermine the suspect's will to invoke his rights once they are read to him." *Id.* at 317.

If *Elstad* is read "as a coherent whole, it follows that 'deliberately coercive or improper tactics' are not two distinct categories . . . but simply alternative descriptions of the type of police conduct that may render a suspect's initial, unwarned statement involuntary." *United States v. Esquilin*, 208 F.3d at 320. *See also United States v. Orso*, 266 F.3d at 1035-1037 (rejecting a reading of the "improper tactics" language in *Elstad* as creating a wholly separate category of official misconduct). *But see United States v. Carter*, 884 F.2d 368, 372-374 (8th Cir. 1984) (suppressing, in dicta, a second, warned statement based on a finding of improper tactics – the so-called "end run around *Miranda*" – where the questioning officers did not give the required *Miranda* warnings until after they had obtained a confession).

The Missouri Court believed that the officer's conduct in this case was an improper tactic (Pet. App. A12), but its reasoning departed fundamentally from the rationale of *Elstad* in at least two ways. First, focusing almost entirely on the officer's subjective intent and seizing on the "circumstances calculated to undermine the suspect's ability to exercise his free will" language in *Elstad*, the Missouri Court presumed that the officer's purpose in initially questioning respondent without giving *Miranda* warnings was to "weaken [her] ability to

knowingly and voluntarily exercise her constitutional rights" (Pet. App. A9).[6] Second, because there was no dissipation of the "taint" from the officer's alleged misconduct, the Court concluded that the officer's conduct must have coerced respondent's confession (Pet. App. A12).

In defining the effect of the first statement on the second, the Missouri Court, like the Oregon court in *Elstad*, focused on a "subtle form of lingering compulsion" resulting from the prior admission. *See Elstad*, 470 U.S. at 311. The Missouri Court found it critical that the first statement was a "breakthrough," stating that the questioning officer "wanted to secure a 'breakthrough' admission before warning Seibert of her rights because he feared that she would assert those rights were she made aware of them" (Pet. App. A9). Thus, the Missouri Court adopted a view very similar to the Oregon court's "cat out of the bag" rationale. According to the Missouri Court, the unwarned statement "tainted" the subsequent, warned statement because once the respondent had made an admission, she was more likely to make the admission again or to make other admissions.

But this Court expressly rejected the "cat out of the bag" rationale as a basis for finding the second statement involuntary. *Elstad*, 470 U.S. at 311. Such claims rely upon the effect of the previous *admission* upon subsequent interrogation, *see id.* at 309-311; however, the Court observed that the Fifth Amendment is not "concerned with moral and psychological pressures to

---

[6] As the dissent pointed out, the record does not support this presumption (Pet. App. A17). While the officer acknowledged that his "hope" and "intent" were to gain an admission (J.A. 31), he did not indicate that this was designed to overcome respondent's will, or that he believed by obtaining an initial admission she would be more likely to make a statement once advised of the *Miranda* warnings.

confess emanating from sources other than official coercion." *Id.* at 304-305. The Court expressed concern that "endowing the psychological effects of *voluntary* unwarned admissions with constitutional implications would, practically speaking, disable the police from obtaining the suspect's informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned confessions." *Id.* at 311 (emphasis in original).

After carrying the presumption of coercion forward to the warned statement, the Missouri Court applied the attenuation doctrine from the Fourth Amendment's "fruits" analysis (Pet. App. A9-A11). The attenuation doctrine recognizes that the connections between an initial constitutional violation and the evidence sought to be excluded may become so attenuated as to dissipate the taint and allow admission. *See Wong Sun v. United States*, 371 U.S. at 487-488. Because the attenuation factors the Missouri Court considered (*e.g.*, passage of time between questioning and change in questioning officer or location) were not present in respondent's case, the Missouri Court found that the respondent was "subjected to a nearly continuous period of interrogation" and thus that her second statement was involuntary (Pet. App. A9-A11).

But in even addressing attenuation, the Missouri Court again disregarded *Elstad*. In *Elstad* this Court found the attenuation factors to be relevant only when the prior statement was actually coerced. *Oregon v. Elstad*, 470 U.S. at 310. This is a logical recognition of the difference between actual and presumptive coercion. A change in officer or location or the passage of time may be required to restore the suspect's ability to exercise free will when, for example, she has been terrorized, beaten or deprived of sleep or food. But the same is not true when the only "taint" that allegedly exists is the lingering psychological impact of the fact

that the suspect has revealed a guilty secret.

In *Elstad*, the Court recognized the impact of having revealed a guilty secret, noting that once a suspect has let the cat out of the bag,

> [she] is never thereafter free of the psychological and practical disadvantages of having confessed. [She] can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession may always be looked upon as fruit of the first.

Id. at 311 (quoting *United States v. Bayer*, 331 U.S. at 540-541) (internal quotation mark omitted). But the Court also recognized that if the "cat out of the bag" theory were a basis for finding an ongoing taint, that taint could not be dissipated by time, or change of place or questioner, and that giving that taint dispositive effect was both impractical and unjustified. *Id.* at 310-312. A suspect who makes a voluntary admission knows the police know the truth, but that knowledge is not the product of coercion, and it does not hamper free will.

The Missouri Court's "breakthrough" analysis would make it virtually inevitable that once a suspect makes an unwarned statement, she would be immunized from making an admissible confession. That result exacts too high a cost from legitimate law enforcement. *Oregon v. Elstad*, 470 U.S. at 312.

B. Focusing on the subjective intent of the officer ignores the relevant inquiry of the Fifth Amendment, improperly seeks to govern police conduct, and leads to disparate treatment of defendants.

For the Missouri Court, what distinguished this case from *Elstad* was the intent of the officer during the initial interrogation (Pet. App. A7). But under *Elstad*, the critical issue surrounding the initial statement is whether it was voluntarily made: "there is no warrant

for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary." 470 U.S. at 318. The question here, then, is whether the fact that the officer acted intentionally is sufficient to render the initial statement involuntary. The answer is clearly no.

In determining whether a Fifth Amendment violation has occurred, this Court has focused on the objective circumstances of an interrogation, rather than the subjective intent of the questioning officer, because the officer's unarticulated intent can have no effect on the individual. An objective rule serves the purpose of the Fifth Amendment: to bar the use of *compelled* testimony.

This Court's preference for an objective test in the Fifth Amendment context is shown by its repeated refusal to apply subjective tests. *See Stansbury v. California*, 511 U.S. 318, 323-325 (1994) (an officer's undisclosed, subjective beliefs have no bearing upon *Miranda*'s objective in-custody determination); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (for purposes of *Miranda*, "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."); *Rhode Island v. Innis*, 446 U.S. 291, 300-302 (1980) ("the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response," regardless of the "underlying intent of the police"); *Beckwith v. United States*, 425 U.S. 341, 346-347 (1976) (that a suspect is the "focus" of a law enforcement investigation when questioned does not, in itself, transform questioning into custodial interrogation).

Even in the Fourth Amendment context, this Court

has stated that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 813 (1996) ("'the fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'") (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)). *See also United States v. Mendenhall*, 446 U.S. 544, 554 n.6 (1980) (opinion of Stewart, J.) (the officer's subjective intent to detain is not determinative of whether a seizure occurred within the meaning of the Fourth Amendment); *United States v. Robinson*, 414 U.S. 218, 236 n. 7 (1973) (the officer's subjective fear is not determinative of necessity for search-incident-to-arrest exception to the Fourth Amendment warrant requirement).

Similarly, in crafting the "public safety" exception to the requirement that *Miranda* warnings precede a suspect's admissible answers, this Court stated that "the availability of that exception does not depend upon the motivation of the individual officers involved." *New York v. Quarles*, 467 U.S. at 655-656. This Court struck a balance between the doctrinal underpinnings of *Miranda* – the need to protect the core guarantee of the Fifth Amendment – and the need for reasonable law enforcement, stating:

> Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.

Id. at 656.

In the Fifth Amendment context, in particular, the focus must be on the individual and whether the circumstances in question tended to have the effect of

compelling a statement. This focus is evident in *Moran v. Burbine*, 475 U.S. at 415-416, where the defendant claimed that law enforcement officers had violated *Miranda* and "tainted" his waiver by interfering with his attorney's ability to communicate with him during custodial interrogation. The defendant in that case was advised of the *Miranda* warnings; however, he was not told that an attorney had offered to represent him (or told about efforts to obtain an attorney for him), and the attorney was prevented from communicating with him. *Id.* at 416-417. Despite this lack of information, but in the absence of any coercive conduct applied to the defendant, this Court concluded that the waiver was valid. *Id.* at 421. Additionally, absent coercive police conduct, this Court observed that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.* at 422-423.

Furthermore, as this Court observed in *Moran*, "whether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights." *Id.* at 423. Indeed, it could be said, as this Court observed in *Moran*, that while a "deliberate" decision to withhold *Miranda* warnings may be "objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Id.* at 423-424.

This Court has refused to treat similarly situated individuals differently based on the subjective intent of the police officer. Rejecting such a result in *Moran*, this Court stated:

> [T]he same defendant, armed with the same information and confronted with precisely the same police conduct, would have knowingly waived his *Miranda* rights had a lawyer not telephoned the police station to inquire about his status. Nothing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so incongruous a result.

475 U.S. at 422. The Missouri Court would do what this Court refused to do in *Moran*: treat defendants "armed with the same information and confronted with precisely the same police conduct" in opposite ways, based on an intent that the defendant did not and could not surmise. This inconsistency is not supported by either the language or the purpose of the Fifth Amendment.

Avoiding the introduction of a subjective-intent element also has the benefit of maintaining the present, relative ease of applying the rules established by *Miranda* and its progeny, particularly *Oregon v. Elstad*. Officers, litigants, and courts know that if the officer does not administer the *Miranda* warnings prior to custodial interrogation, any statements obtained during that interrogation are inadmissible in the prosecution's case in chief (with only a few exceptions). And *Elstad* informs officers and courts how to determine whether a subsequent, warned confession is admissible. That determination does not require inquiry into the mental state of the questioning officer. Rather, courts examine the objective circumstances of the interrogation. One of the primary purposes of the *Miranda* decision was to create a bright-line test for admissibility of in-custody interrogations. *Elstad* 470 U.S. at 306-307 n. 1. Adopting the Missouri Court's approach would unnecessarily complicate the bright-line rule by forcing courts to determine the officer's subjective intent in each case where the initial warnings were not given.

In short, the purpose of *Miranda* "is not to mold police conduct for its own sake," because "[n]othing in the Constitution vests in [this Court] the authority to

mandate a code of behavior for state officials wholly unconnected to any federal right or privilege." *Moran v. Burbine*, 475 U.S. at 425. Rather, the purpose of *Miranda* is to secure the Fifth Amendment privilege against *compelled* self-incrimination. Thus, the appropriate focus of judicial inquiry is on the objective circumstances and their effect on the individual. The courts should not, as the Missouri Court did, turn Fifth Amendment analysis on its head, focus upon the subjective intent of the officer, and, based on the officer's presumed purpose, conclude that an otherwise voluntary statement is involuntary. If a law enforcement practice – whether purposeful or accidental – does not actually violate the Fifth Amendment, or jeopardize the core guarantee of the Fifth Amendment, it should not be curtailed or deterred with additional codes laid down by this Court citing the Fifth Amendment as authority.

C. The deterrence rationale of the Fourth Amendment exclusionary rule should not be imported into the Fifth Amendment to create a broader *Miranda* exclusionary rule.

The foundation for the Missouri Court's broadening of *Miranda*'s exclusionary rule was the deterrence rationale of the Fourth Amendment's "fruits" doctrine. The Missouri Court not only imported a broad "fruits" exclusionary rule into the Fifth Amendment context, but also gave the deterrence rationale a pivotal role, stating: "An intentional violation of *Miranda* shifts the focus from the goal of gaining trustworthy evidence – though that is still a major concern – to the goal of deterring improper police conduct" (Pet. App. A7). If the primary purpose of *Miranda* were to deter unwarned interrogation altogether, then this extension of *Miranda*'s exclusionary rule might make sense. But that is not the primary purpose of *Miranda*.

In the Fourth Amendment context, the broader

exclusionary rule serves the primary purpose of deterring improper police conduct – *i.e.*, future violations of the Fourth Amendment. But to warrant the broadening of *Miranda*'s exclusionary rule under the Fifth Amendment, there must be a compelling need to both deter improper police conduct and to assure trustworthy evidence. *Oregon v. Elstad*, 470 U.S. at 308. However, as discussed above, when the alleged official "misconduct" was the mere failure to give *Miranda* warnings, this Court has already declined to extend the deterrence rationale into the Fifth Amendment context. *Id.* at 308-309. And, although the Court has considered whether the need to deter allegedly improper conduct justifies a broader *Miranda* exclusionary rule in other circumstances, in each case the Court has concluded it does not. *See Harris*, 401 U.S. at 225; *Hass*, 420 U.S. at 723; and *Tucker*, 417 U.S. at 447.

The Court's refusal to import the Fourth Amendmended's "fruit of the poisonous tree" doctrine into the Fifth Amendment context is explained by the Court's recognition that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." *Dickerson*, 530 U.S. at 441. Fourth Amendment rights are substantive in nature. A violation of the Fourth Amendment search and seizure provision is completed when the officer performs an unreasonable search or seizure. No further official misconduct is needed to support the finding of a constitutional violation. Thus, the broad "fruits" exclusionary rule is employed not to avoid or cure the already-completed constitutional violation, but to deter future violations.

By contrast, the Fifth Amendment privilege is a procedural right. The constitutional violation occurs when compelled testimony is used against a defendant to prove the prosecution's case, not when she is compelled to speak. Thus, *Miranda* requires only the exclusion

of an unwarned statement from the prosecution's case at trial. Read properly, the Fifth Amendment regulates the admission of statements at trial, not the out-of-court conduct of the police. *See Chavez v. Martinez*, 123 S.Ct. at 2001-2003 (plurality opinion). In short, police officers do not commit misconduct by merely engaging in unwarned questioning. Consequently, absent actual coercion, there is no need to deter such conduct by broadening the *Miranda* exclusionary rule.

Even if the Fifth Amendment addressed police conduct so as to justify a limited deterrence rationale, barring only the use of the unwarned statement itself in the prosecutor's case in chief would be a sufficient remedy. In *Elstad*, this Court concluded: "[The dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief." 470 U.S. at 318; *see also Chavez v. Martinez*, 123 S.Ct. at 2013 ("The identification of a *Miranda* violation and its consequences . . . ought to be determined at trial. The exclusion of unwarned statements, when not within an exception [to *Miranda*], is a complete and sufficient remedy.") (Kennedy, J., concurring in part and dissenting in part); *New York v. Quarles*, 467 U.S. at 669 ("The harm caused by failure to administer *Miranda* warnings relates only to admission of testimonial self-incriminating, and the suppression of such incriminating should by itself produce the optimal enforcement of the *Miranda* rule.") (O'Connor, J., concurring in part and dissenting in part); *Harris v. New York*, 401 U.S. at 225 (holding that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.").

Thus, under *Elstad*, there is already adequate, though limited, deterrence to engaging in unwarned interrogation. The officer in this case recognized that, by

utilizing the two-stage interrogation as he was trained to do,[7] he was "rolling the dice" (J.A. 35). He knew that if the respondent made an initial statement, but after being advised of her rights refused to waive and make a second statement, he would have no admissible statement. Such knowledge will not always deter an officer from engaging in unwarned interrogation, because gaining admissible evidence is not the only valid purpose of interrogation. But it does have some deterrent effect, for when an officer chooses to proceed without the warnings, the exclusion of any unwarned statement is certain. Thus, officers will give the warnines in most instances, or, consistent with the core guarantee of the Fifth Amendment, tread very carefully during unwarned interrogation, so that any subsequent, warned statement will be admissible at trial as truly voluntary.

Excluding only the unwarned statement itself is an adequate constitutional remedy for an officer's failing to give *Miranda* warnings. *Oregon v. Elstad*, 470 U.S. at 318 ("the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief."). It also strikes an appropriate balance

---

[7] In the petition for certiorari, petitioner stated that the officer "may" have been referring to the Reid Institute when he said he had been trained at a "national" institute (Pet. at 17 n.8). Petitioner has since been informed that the Reid Institute does not train officers to intentionally withhold warnings prior to custodial interrogation. The Reid training materials discuss advantages of "conducting a nonaccusatory interview before an interrogation[,]" but officers are told that "[t]he only time a police interrogation may be conducted of a suspect who is in custody . . . is after he has received the required warnings[.]" FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 5-10, 218, 491 (4th ed. 2001). The materials describe *Oregon v. Elstad* as merely providing "corrective measures that may be employed to salvage an interrogation opportunity." *Id.* at 516.

between the Fifth Amendment purpose of protecting the individual from compulsion and the needs of law enforcement. This balance recognizes that unwarned questioning is not *per se* misconduct, and that unwarned questioning may serve legitimate law enforcemended purposes beyond the discovery of admissible evidence, including: ensuring public safety; locating accomplices or developing evidence against them; finding and removing from circulation dangerous weapons, drugs or other contraband; locating a crime victim; or focusing an investigation when there are multiple suspects.

This case involved such concerns. Although the questioning officer hoped to obtain information, he knew that no statement made before he administered the warnings and obtained a waiver would be admissible to prove the state's case (J.A. 31, 35-36). But even inadmissible evidence would help the investigation. Although respondent was already a suspect, there were multiple suspects involved. The trailer where the victim died was occupied by the respondent, her five sons, and the victim (Tr. 854-855). Five people were present at the first meeting to plan the fire, including respondent, two of her sons, and two of their friends (J.A. 68; State's Exhibit 42; Tr. 838, 858). Ultimately, two of the boys who had been present at the planning meeting participated in setting the fire (Tr. 633-634, 867-872, 903-904). The interrogation of respondent took place relatively early in the investigation – just five days after the murder (J.A. 17). The officers had interviewed Derrick Roper, and he had provided them with information (J.A. 46). It was reasonable for the officers to act immediately upon that information, arrest the respondent, and attempt to get information to both sort out the roles of the various conspirators and focus the investigation.

Obtaining information, even if inadmissible, was important not just to ascertain the facts, but to

appropriately exercise prosecutorial discretion in arrests, charges, promises of immunity, and plea agreements. One of the conspirators, a juvenile, was persuaded by his mother to participate in the murder as a means of helping her cover up the death of his brother (Tr. 857, 859-860, 903-904). Knowing the level of the mother's involvement and the pressure she brought to bear on her son might ultimately influence charging or plea decisions. In fact, the state entered into a plea agreemended with the son (Tr. 877-878, 903).

Again, here, the officer had legitimate reasons to seek information early in the investigation, even if the information would not ultimately be admissible. He did not engage in any objectively coercive conduct, and prior to seeking the confession that was actually used at trial, he carefully advised the respondent of the *Miranda* warnings and obtained a waiver without exerting pressure upon her. And even if respondent had not waived the privilege, the officer gained information that had value to the prosecution regardless of its admissibility.

Miranda was never designed to prohibit such an inquiry; rather, it provides safeguards in the custodial setting that are intended to ensure a valid waiver of the Fifth Amendment privilege. Thus, once *Miranda*'s safeguards are put in place, there is no reason to exceed *Miranda*'s holding; the traditional methods of deterring actual official misconduct are sufficient.

In sum, whether officers intentionally withhold *Miranda* warnings or inadvertently fail to give them, the effect upon the suspect is the same. A subjective intent is irrelevant in determining whether the suspect's eventual waiver is valid. Thus, so long as police conduct stays within the constitutional bounds laid down by *Miranda* and its progeny, such conduct should be allowed to protect "society's compelling interest in finding,

convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. at 426.

IV. RESPONDENT'S SUBSEQUENT, WARNED STATEMENT WAS VOLUNTARY AND WAS PROPERLY ADMITTED UNDER THE RATIONALE OF *OREGON V. ELSTAD*.

To determine the admissibility of respondent's second, warned statement, *Elstad* requires the resolution of two questions: first, did the police engage in any actually coercive conduct during the first, unwarned interrogation; and second, was the subsequent, warned statement knowingly and voluntarily made. If there was no actually coercive police conduct during the first interrogation, then there is no "taint" from the decision to withhold *Miranda* warnings, and the second statement is admissible if it was knowing and voluntary. If there was actually coercive police conduct during the first, unwarned interrogation, then *Elstad* requires that the "taint" from the coercive questioning dissipate before police can obtain a subsequent, usable statement.

In Missouri, when reviewing a trial court's ruling on a motion to suppress, there must be "substantial evidence" to support the ruling. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc), *cert. denied*, 524 U.S. 961 (1998). The evidence is viewed in the light most favorable to the trial court's ruling. *Rousan*, 961 S.W.2d at 845. "Deference is given to the trial court's superior opportunity to determine the credibility of witnesses." *Id.* Under this standard, respondent's warned statement passed the *Elstad* test, and the decision to admit the warned statement should have been upheld.

A. The officers did not engage in actually coercive conduct during the unwarned interrogation.

Traditional indicia of coercion revolve around the duration and conditions of the detention, the manifest attitude of the police toward the suspect, the suspect's physical and mental state, and the "'diverse pressures which sap or sustain [the suspect's] powers of resistance and self-control.'" *See Colorado v. Spring*, 479 U.S. 564, 574 (1987) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (opinion of Frankfurter, J.)). Here, the duration of the first interrogation was very brief – about thirty minutes – and such a short period of time, in the absence of any physical duress or threats, did not overbear respondent's will. *See State v. Rousan*, 961 S.W.2d at 846 (two interrogations lasting a total of about three and one half hours, over a six-hour period, were not coercive); *see also Stein v. New York*, 346 U.S. 156, 185 (1953), *overruled in part by Jackson v. Denno*, 378 U.S. 368 (1964) (twelve hours of intermittent questioning by successive officers, over a thirty-two hour period, with the suspects sleeping and eating in the interim, was not "so oppressive as to overwhelm powers of resistance."); *compare Ashcroft v. Tennessee*, 322 U.S. 143, 153-154 (1944) (thirty-six hours of questioning by successive officers, with no respite for the defendant, compelled any confession that was made).

Likewise, the conditions of the interrogation – a small interview room at the police station – were not so coercive as to overcome respondent's will. The presumptive coercion that attaches to custodial interrogation is not the equivalent of actually coercive police conduct, *see Oregon v. Elstad*, 470 U.S. at 317 ("When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled . . . ."), and there was no evidence that respondent felt afraid or

oppressed at the police station.

Additionally, the attitude and actions of the questioning officers were not coercive. Questions were asked in low, conversational tones, and there were no threats or promises made to induce respondent's confession (J.A. 21-22). At some point, the questioning officer gently squeezed respondent's arm (J.A. 59). The Missouri Supreme Court appears to have interpreted this act as intended to put pressure on respondent (Pet. App. A10), but the officer's action was precipitated by respondent's outward display of grief (J.A. 59). Thus, such action was far more consistent with comforting respondent while she dealt with difficult events.

The interrogation did take place in the early morning hours, but there was no evidence that respondent was exhausted, groggy, sleepy, or otherwise incapable of answering the officer's questions. Respondent was an adult woman, she had been sleeping prior to the arrest, and there was no reason to believe that she could not wake up and, after the passage of about forty-five minutes, make voluntary statements. *See Watson v. Detella*, 122 F.3d 450, 452, 456 (7th Cir. 1997) (although defendant had not slept or eaten during the four hours he was in custody from about 4:30 a.m. until he gave his second, fully warned written confession, there was "no evidence that his free will was overcome by either exhaustion or hunger."). Admittedly, the respondent was also suffering emotionally, but those emotions were a natural response to the untimely death of her young son, the injuries her other son had received in carrying out the murder she had orchestrated, and her consciousness of guilt. There was no evidence that she was given the "third degree" and that, as a consequence, she broke down and became emotional. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (evidence of the defendant's mental condition alone, absent evidence of police coercion is insufficient to demonstrate

that a confession is involuntary); *Oregon v. Elstad*, 470 U.S. at 304-305 (the Fifth Amendment is not "concerned with moral and psychological pressures to confess emanating from sources other than official coercion.").

In short, consistent with the demands of *Elstad*, there was no evidence that the police engaged in actually coercive conduct during the first interview. To the contrary, the police engaged in a brief interrogation that "had none of the earmarks of coercion." *See id.* at 316. The answer to the first *Elstad* question, then, is that the initial, unwarned statement was not actually coerced.

B. Respondent's second, warned statement was knowingly and voluntarily made.

After the first, unwarned interrogation, and after a fifteen- to twenty-minute break (wherein respondent was given a cup of coffee and allowed to smoke a cigarette), the officers carefully administered the *Miranda* warnings, and respondent executed the waiver without being pressured in any way. Thereafter, her second, warned statement was "knowingly and voluntarily made." *Oregon v. Elstad*, 470 U.S. at 309.

The second interrogation, as with the first, was not coercive. The interrogation continued in the same room, the officer's tone was low and conversational, there were no threats, and the questioning lasted only eighteen minutes (J.A. 21-22, 65, 73; State's Exhibit 42). Admittedly, respondent was not affirmatively informed that her previous statement could not be used to prove her guilt. But, as this Court stated in *Elstad*, "[s]uch a requiremended is neither practicable nor constitutionally necessary." 479 U.S. at 316. This is because the *Miranda* warnings "convey[] the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.'" *Id.* at 311 (quoting *Wong Sun v. United*

States, 371 U.S. at 486). Moreover, "[t]his Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." *Id.* at 316; *Moran v. Burbine*, 475 U.S. at 422 ("[w]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.").

The officer did make a few references to the first interrogation, but at no time was the unwarned interrogation used to pressure the respondent into waiving her right to remain silent. The officer began by acknowledging that they had "been talking for a little while about what happened on" the day of the murder (J.A. 66; State's Exhibit 42). Toward the conclusion of the interrogation, the officer again mentioned their previous discussion and asked, "didn't you tell me that [the victim] was supposed to die in his sleep?" (J.A. 70; State's Exhibit 42). Those references did not render respondent's second statement involuntary. The officer did not, for example, coax respondent into signing the waiver by suggesting that her previous, unwarned statemended made resistence futile. He did not suggest that she might as well repeat her previous statement because they already had enough to convict her. Had there been any such coaxing, then the officer's conduct would have violated the rule of *Elstad*, which would not countenance an officer's "exploit[ing] the unwarned admission to pressure respondent into *waiving* [her] right to remain silent." 470 U.S. at 316 (emphasis added). Under such circumstances, a waiver and subsequent statement might very well have been compelled.

In any event, the officer did not misuse the unwarned statement to pressure a waiver; rather, the officer merely referred to the "guilty secret" that respondent knew she had already revealed to the police. That small reminder of what she had already voluntarily

divulged did not render her subsequent statement involuntary. *See id.* at 311-312 (declining to allow the psychological effect of a voluntarily-disclosed "guilty secret" to "disable the police from obtaining the suspect's informed cooperation"). Accordingly, having considered the totality of the circumstances the trial court properly concluded that respondent's will was not overborne and that her second warned confession was knowingly and voluntarily made.

CONCLUSION

The judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

KAREN K. MITCHELL
Chief Deputy Attorney General
Counsel of Record
JAMES R. LAYTON
State Solicitor
SHAUN J MACKELPRANG
KAREN P. HESS
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774

Counsel for Petitioner